Case No. 91-542

IN THE

Supreme Court of the United States

October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, *et al.*,
Petitioners,

against

FRANK ROBERT WEST, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief of the States of New York and Ohio *Amicus Curiae* in Support of Respondent on the Issue of *De Novo* Review

ROBERT ABRAMS
Attorney General of the State of New York
The Capitol
Albany, NY 12224
(518) 474-8101

LEE FISHER
Attorney General of Ohio
30 East Broad Street
Columbus, Ohio 43266-0410
Attorneys for Amicus Curiae

JERRY BOONE*
Solicitor General
PETER H. SCHIFF
Deputy Solicitor General
MARTIN A. HOTVET
Assistant Attorney General
Albany, NY
Of Counsel
**Counsel of Record*

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(1833—LC5-719—1992)

Question Presented

This brief will address the following question:

In determining whether to grant a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo?*

Table of Contents.

TABLE OF AUTHORITIES.

MISCELLANEOUS:

Case No. 91-542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

ELLIS B. WRIGHT, JR., WARDEN, *et al.*,

Petitioners,

against

FRANK ROBERT WEST, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief of the States of New York and Ohio *Amicus Curiae* in Support of Respondent on the Issue of *De Novo* Review

Interest of Amicus Curiae

This case presents the question whether a habeas corpus court should continue to review *de novo* the state court's application of constitutional law to the facts. Resolution of this issue hinges upon the proper construction of the statute authorizing habeas corpus for state prisoners. 28 USC §§ 2241 *et seq.*, and prior caselaw from the Court. The amici states have an interest in allowing Congress to have sufficient opportunity to act in this area, as well as an interest in preserving the finality of state court decisions while protecting individual rights.

Summary of Argument

Notwithstanding the significant interests of finality and comity, it is our view that the balance of considerations militates in favor of the present rule of *de novo* review for claims of abridgement of constitutional rules implicating fundamental fairness and accuracy. Chief among the considerations is that habeas corpus is governed by statute. 28 USC §§ 2241 *et seq.* The statute has long been interpreted by this Court to require *de novo* review of this type of case by the federal court in a habeas proceeding. The rule of *de novo* review is implicit in the earliest cases applying the statute, adumbrated in *Moore v. Dempsey*, 261 US 86 (1923), clearly stated in *Brown v. Allen*, 344 US 443 (1953), and unquestioned since *Brown*. No special circumstances warrant a sweeping departure from the long-settled rule as suggested by the question posed by this Court.

ARGUMENT

The Court should not announce a sweeping rule abandoning *de novo* review of application by state courts of federal constitutional law to the facts as suggested by the question posed by this Court.

Habeas corpus entails significant costs. It significantly affects finality in criminal litigation. It intrudes upon " 'the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights' ". *Coleman v. Thompson*, ____ US ____, 111 S Ct 2546, 2564, 115 L ed 2d 640, 668 (1991). Moreover, considerations of federalism and comity "counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants". *Cabana v. Bullock*, 474 US 376, 391 (1986). The very low rate of success for prisoners challenging New York decisions in habeas corpus—three percent[1]—establishes that generally state courts are correctly applying federal constitutional law. These are weighty considerations militating in favor of a rule of deference to reasonable state court decisions as a matter of policy.

However, on the other side of the scale, are a number of considerations which, in our view, outweigh the interests of finality and comity. Chief among them is that habeas corpus is a statutory matter and the statute embodies the rule long settled in this Court that ultimate constitutional issues are a matter for *de novo* review. The statute reflects the Congressional judgment as to the extent of the "need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty". *Stone v. Powell*, 428 US 465, 491-492 n 31 (1976). The Court should not

---

[1]Faust, Rubenstein & Yackle, The Great Writ in Action: Empirical Light on the Habeas Corpus Debate, 18 NYU Rev L & Soc. Change 637, 680 (1991).

utilize this case to announce a sweeping rule abandoning the long-standing practice of *de novo* review, as suggested by the question posed by the Court. The Court should also allow Congress to have an opportunity to deal with the general issue of habeas corpus reform.

In the Judiciary Act of February 5, 1867, ch 28, § 1, 14 Stat 385, Congress expressly vested "plenary power" in the federal courts; they were to "proceed in a summary way to determine the facts of the case * * * and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty". *Wingo v. Wedding*, 418 US 461, 468 (1974); *see Holiday v. Johnston*, 313 US 342 (1941). The legislation enlarged for the federal courts the very limited grounds for habeas review of state actions previously afforded. *Hawk v. Olson*, 326 US 271, 274-275 (1945); *In re Neagle*, 135 US 1, 69-72 (1890); see, Note, 61 Harvard L Rev 657, 658-659 (1948).

When the provisions of the Habeas Corpus Act were revised and consolidated in 1948 into 28 USC 2241, *et seq.*, although some words were deleted, there was no change in this regard (§ 2243). *Wingo*, 418 US at 468-469. Nothing in the legislative history indicates that Congress, by adoption of the 1948 recodification, intended to restrict the district court's consideration of petitions raising the same issues already resolved in the state courts. *Brown v. Allen*, 344 US 443, 462-463 (1953). Thus, it was no departure from the statute when this Court stated in *Brown* that:

> "A federal judge on a habeas application is required to 'summarily hear and determine the facts and dispose of the matter as law and justice require', 28 USC § 2243. This has long been the law" (344 US at 462).

Further, the conclusions in the opinions[2] in this connection that the state adjudication was not *res judicata* but carried the weight that federal practice gives to the conclusions of a court of last resort of another jurisdiction on constitutional issues, 344 US at 458, 506, was simply a further explanation of the earlier examination of the statute. Justice Frankfurter wrote:

> "Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues, no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misperceived a federal constitutional right" (344 US at 508).

Brown did not break new ground in this regard, although it represented the clearest statement of the principle. As demonstrated *infra*, pp 9-11, it correctly interpreted the statute as originally conceived. It also represented no departure from earlier cases such as *Moore v. Dempsey*, 261 US 86 (1923), where habeas was authorized to review a claim that a state trial had been mob dominated, notwithstanding that the State appellate court had reviewed the issue and found no error. *See Sumner v. Mata*, 449 US 539, 543-544 (1981).[3]

---

[2]The opinion of Justice Reed and that of Justice Frankfurter both represented the opinion of the Court. 344 US at 451-452. Justices Black and Douglas agreed in substance (344 US at 513) as did Justices Burton and Clark (344 US at 488).

[3]Professor Bator argued, citing cases like *Ex Parte Hawke*, 321 US 114 (1944), that *Brown* did break new ground. Bator, Finality in Criminal Law and Habeas Corpus For State Prisoners, 76 Harvard L Rev 441, 493-499 (1963). He argued that *Moore* was based on the inadequacy of the state process. 76 Harvard L Rev at 488-489 & n 131. We think the better reading of *Moore* is that the Court contemplated *de novo* review in stating that habeas corpus would lie when "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and * * * the state courts failed to correct the wrong", notwithstanding "perfection in the machinery for correction * * *". 261 US at 91.

Subsequent to *Brown v. Allen*, there was a vigorous campaign in Congress to revise habeas corpus to require deference to state courts. Proposed amendments, which passed the House but not the Senate, precluded habeas when there had been a "fair and adequate opportunity" to raise the issue in the State court. HR5649, HR Rep. No. 1200, 84th Cong, 1st Sess. (April 11, 1955); HR8361, HR Rep. No. 1293, 85th Cong, 2d Sess. (Jan. 23, 1958); *see, Pollak*, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale Law Journal 50 (1956). This campaign culminated in the 1966 Amendments to sections 2244 and 2254. PL 89-711, 80 Stat 1104. Most pertinently, a new subsection d was added to section 2254 which provided that the State court fact findings "shall be presumed to be correct" unless one of eight factors bringing into question the fairness of the procedures employed by the State court was established. Section 2243 was not amended and the amendment which became section 2254(d) limited the plenary power of the habeas court only with respect to State court fact findings.

The 1966 amendments have "generally been understood as a codification of" *Townsend v. Sain*, 372 US 293, 318 (1963), which followed *Brown v. Allen* in recognizing the deference due to state court findings of fact, but requiring plenary review of legal questions. Wright-Miller-Cooper, 17A Federal Practice and Procedure § 4265.1, p 404 (1988). "[T]here is absolutely no indication that [Congress] intended to alter Townsend's understanding that the 'ultimate constitutional question' * * * was * * * subject to plenary federal review". *Miller v. Fenton*, 474 US 104, 112 (1985); *see also, Sumner v. Mata*, 455 US 591, 597 (1982); *Stone v. Powell*, 428 US at 528.

The House Report establishes that no change was intended. HR Rep. No. 1892, 89th Cong, 2d Sess. (Aug. 25, 1966). The report (pp 5-7) discussed the controversy raised by *Brown v. Allen* and noted *Townsend v. Sain* and described the efforts of the Judicial Conference, beginning in 1953, to address the issue. The Conference had created a Committee on Habeas Corpus to examine the matter. While that Committee had first proposed to remove all habeas jurisdiction from federal courts, that was rejected in favor of a proposal that three judge courts be utilized. That proposal was also rejected as too cumbersome, and the Committee settled on the proposals which became law.

The House report stated (p 3) that the purpose of the new provisions was as stated by the Judicial Conference:[4]

> "* * * to provide for a qualified application of the doctrine of *res judicata* to an extent we regard as needed and desirable to proceedings on applications for habeas corpus in the U.S. courts * * * and by statutory enactment to create reasonable presumptions and fix the party on whom the burden of proof, as to certain factual issues, shall rest in such proceedings, but without the impairment of any of the substantive rights of the applicant" (3 1966 US Code Cong & Admin News, p 3671).

In no decision since the 1966 amendments has this Court suggested that the amendments altered the rule that the review by the habeas corpus court was to be plenary. On the contrary, since 1966 this Court has regularly and unequivocally held that *de novo* review of questions of constitutional law is required, although section 2254(d) requires deference to state court fact finding. *Miller v. Fenton*, 474 US at 111-112; *Strickland v. Washington*, 466 US 668, 698 (1984); *Rushen v.*

---

[4]The report of the Judicial Conference's Committee on Habeas Corpus was appended to and made part of the House as well as the Senate Report, S Rep. No. 1797, 89th Cong, 2d Sess. (Oct. 18, 1966).

Spain, 464 US 114, 120 (1983); *Sumner v. Mata,* 455 US at 597; *Cuyler v. Sullivan,* 446 US 335, 341-342 (1980).

We note, moreover, that there is presently pending before Congress legislation to reform habeas corpus. On July 11, 1991 the Senate passed an omnibus crime bill containing habeas corpus provisions, including an amendment to section 2254 providing that an application for a writ "shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings." 137 Cong Rec S9832 (daily ed July 11, 1991) (text of S1241, 102d Cong, 1st Sess., *see,* 137 Cong Rec. S9982, S9999-10001 [daily ed July 15, 1991]). On October 17, 1991, the House of Representatives, in the course of considering its own omnibus crime bill which contained habeas corpus provisions, but did not change prior law on *de novo* review (HR3371, title XI, HR Report 102-242, 102d Cong., 1st Sess, pp 21-24) rejected an amendment offered by Representative Hyde which would, in essence, have substituted for habeas corpus, the full and fair adjudication standard adopted by the Senate. 137 Cong Rec H7996-8005 (daily ed Oct. 17, 1991); see also H8168-8173 (daily ed Oct. 22, 1991) (motion to recommit). The House passed its bill on October 22, 137 Cong. Rec. H8173 (daily ed Oct. 22, 1991). The House resolution of this issue was approved by the Conference Committee on November 24. *See,* Conference Report to accompany HR3371; 137 Cong. Rec. H11686-11744 (daily ed Nov. 26, 1991). On November 26, 1991, the full House approved the omnibus crime bill as reported by the Conference Committee. 137 Cong Rec H11757 (daily ed Nov. 26, 1991). The measure is pending in the Senate a vote on cloture having failed on November 27. 137 Cong. Rec. S18616 (daily ed Nov. 27, 1991).[5]

[5]In addition, legislation to require deference had passed the House but not the Senate in 1955 (*supra,* p 6). Such legislation had passed the Senate but not the House in 1984. 130 Cong Rec S1854-72 (1984); *see,* S Rep No. 98-226, 98th Cong, 1st Sess. (Sept. 14, 1983). The 1966 amendments represent the farthest reach of Congressional willingness to limit the plenary power of the habeas court.

An analogous situation confronted this Court in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Devel. Commn.,* 461 US 190 (1983). There, the House had also declined to accept a proposed amendment already accepted by the Senate in legislation under consideration contemporaneous with Supreme Court consideration of the issue. Under such circumstances, the Court said that it would "appear improper for us to give a reading to the Act that Congress considered and rejected". 461 US at 220.

In any event, *Brown v. Allen* correctly interpreted the statute as originally conceived with respect to plenary review. Nothing in the 1867 statute referred to or required deference to state court determinations. On the contrary, the statute provided for the habeas court to "proceed in a summary way to determine the facts of the case" and, "if it shall appear that the petitioner is deprived of his liberty in contravention of the constitution", he must "forthwith be discharged". Further, the statute contemplated interlocutory challenges to state criminal proceedings, and expressly gave the habeas court the power to enjoin such proceedings. *Mitchum v. Foster,* 407 US 225, 234-235 & n 16 (1972).

The intent of Congress in 1867 with respect to plenary review must be viewed in its common law context. *See, Allen v. McCurry,* 449 US 90, 99-100 (1980). The preclusion rules of *res judicata* had no place in the common law of habeas corpus. *Salinger v. Loisel,* 265 US 224, 230 (1924); *see* Church, Writ of Habeas Corpus, § 386 (2d ed 1893). The decision of a court without jurisdiction was considered a "nullity", so by definition it had no subsequent force or effect. See *In re Lange,* 18 Wall 163 (1873); Bailey on Habeas Corpus §§49-51 (1913).

That plenary review was intended is confirmed by the early decisions of the Court. Shortly after its passage, this Court recognized the "most comprehensive character" of the legis-

lation. "It is impossible to widen this jurisdiction". *Ex Parte McCardle*, 73 US 318, 326 (1867).[6] In *In re Neagle*, 135 US 1 (1890), this Court affirmed the granting of the writ by the circuit court for a State prisoner, a Deputy Marshall of the United States charged with murder, whose trial was pending. The Court, placing the 1867 Act in the context of prior grants of habeas corpus jurisdiction, 135 US at 69-72, noted the "broad ground" of the statute and the plenary power of the habeas court to consider the facts and direct release. 135 US at 72.

In *Ex Parte Royall*, 117 US 241 (1886), the Court in upholding denial of the writ pending consideration of the claim in question by the state court and completion of state proceedings, explicitly acknowledged the power of the habeas court to entertain the writ following conviction and to direct release if the State court lacked jurisdiction.. 117 US at 247, 253. Likewise, in *Cook v. Hart*, 146 US 183 (1892), it was stated that objections should first be raised in the State courts, but "[s]hould * * * [his] rights be denied, his remedy in the Federal court will remain unimpaired". *See also, Minnesota v. Brundage*, 180 US 499, 501-502 (1901); *In re Friedrich*, 149 US 70, 76-77 (1892). Admittedly, the *scope* of habeas corpus during this period was limited to questions of "jurisdiction" (*Wainwright v. Sykes*, 433 US 72, 77-79 [1977]), but the decisions evidenced the plenary power of the habeas court with respect to issues within its scope. *See, Fay v. Noia*, 372 US 391, 418-421 (1963). Significantly, Justice Harlan, although otherwise dissenting, *agreed* on this point in *Fay*. 372 US at 454. See generally, Church on Habeas Corpus §84 (2d ed 1893).

[6]There are no decisions following *McCardle* until 1886. The Supreme Court's jurisdiction in this class of cases was removed by the Act of March 27, 1868, ch 34, § 2, 15 Stat 44. Jurisdiction was restored by the Act of March 3, 1885, ch 353, 23 Stat 437.

Professor Bator's survey of the cases is not to the contrary. Bator, 76 Harvard L Rev at 465-474, 478-483. In our view, the gravamen of his argument is that the Congress in 1867 did not intend an expansion of the scope of habeas corpus to convert it into an ordinary writ of error. 76 Harvard L Rev at 475. His discussion of the cases confirms that while their scope was limited to "jurisdictional" issues, the habeas court's power was plenary.

In sum, it seems to us that with respect to *de novo* review, the rule of *Brown v. Allen* properly interpreted the habeas corpus statute as originally conceived. The legislative history of the 1966 amendments confirms the correctness of that reading.

In addition to considerations of statutory construction, those of *stare decisis* also weigh "heavily against any suggestion that [the Court] now discard the settled rule in this area." *Miller v. Fenton*, 474 US at 115. As demonstrated *supra*, the rule is implicit in the earliest cases and in *Moore v. Dempsey*. In any event, no one disputes that, except for *Stone v. Powell*, which has been limited to the Fourth Amendment context (*see*, Wright-Miller-Cooper, 17A Federal Practice and Procedure, § 4263.1 [1988]), the rule of *de novo* review was clearly stated in *Brown v. Allen* and has been unquestioned since. In *Jackson v. Virginia*, 443 US 307 (1979), this Court applied the rule of *de novo* review in a case raising the issue of proof beyond a reasonable doubt. The Court expressly declined to employ the rule of deference adopted in *Stone v. Powell*. 443 US at 323-324.

We do not believe there is the requisite "special justification" for departure from the doctrine of *stare decisis*. *Patterson v. McClean Credit Union*, 491 US 164, 172 (1989). On the contrary, weighty considerations counsel against the wholesale change in the settled role of *de novo* review that the additional question posed by the Court suggests.

The long-standing rule of *de novo* review is ultimately predicated upon the "need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty", notwithstanding the resulting intrusion upon important values, which include finality in criminal trials and the minimization of friction between the federal and state systems of justice. *Stone v. Powell*, 428 US at 491-492, n 31. A prisoner retains a "powerful and legitimate interest in obtaining his release from custody if he is innocent". *Kuhlmann v. Wilson*, 477 US 436, 452 (1986) (plurality); *see*, Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments", 38 U Chicago L Rev 142, 149-154 (1970).

The additional safeguard purpose is reflected in the exceptions recognized in the recent retroactivity cases. Generally, "new rules" may not be the basis for habeas corpus. *Sawyer v. Smith*, ____ US ____, 110 S Ct 2822, 111 L ed 2d 193 (1990). However, there are two exceptions. Pursuant to the second exception, a habeas proceeding may be predicated upon a new rule if the new rule implicates "bedrock procedural elements essential to the fairness of the proceeding". *Sawyer v. Smith*, 110 S Ct at 2831, 111 L ed 2d at 211. *Teague v. Lane*, 489 US 288 (1989) (plurality), which created this exception,[7] grounded it upon Justice Harlan's reasoning in *Desist v. United States*, 394 US 244, 262 (1969), that "one of the two principal functions (of habeas corpus) was 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted' ". While the retroactivity question has been resolved by reference to the deterrence function of the writ, *Saffle v. Parks*, 494

[7]The exact scope of this exception is unclear. *Teague* stated that it covered only elements of procedural fairness which are "an 'absolute prerequisite' to fundamental fairness". 489 US at 314.

US 484, 488 (1990), the purport of the retroactivity cases is not that this is now the only recognized purpose of habeas corpus. Rather, their purport is that the interests of comity and finality "outweigh" the other purpose—the need for an additional safeguard—in the retroactivity context, except for new rules implicating bedrock procedural elements. *See*, Hoffmann, The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners, The Supreme Court Review, 165, 177-180 (1989).

The additional safeguard purpose warrants *de novo* review when any claim of abridgement of constitutional rules implicating fundamental fairness and accuracy is implicated. Such protections include assurance that confessions are voluntary. *Miller v. Fenton, supra; see, Jackson v. Denno*, 378 US 368, 376 (1964). Other like protections include the right to counsel (*Johnson v. Zerbst*, 304 US 458 [1938]) and freedom from conviction based on the knowing use of false evidence. *Mooney v. Holohan*, 294 US 103 (1935).

What is ultimately at stake with respect to the question posed by this Court is the extent of a prisoner's claim on a federal forum. Certainly, there is no "intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse". Bator, 76 Harvard L Rev at 509. Nevertheless, Professor Bator recognized that "[i]mportant values may be served by having federal judges pass on federal issues." 76 Harvard L Rev at 510:

> "Even in a very general sense a federal judge, operating within a different system and with a differently defined set of institutional responsibilities, may bring to bear on such issues an objectivity, a freshness and insight which may have been denied to the state judge,

no matter how conscientious, whose perspective will be subtly shaped by implicit assumptions derived from his responsibilities within the state institutional framework, who stands within *that* system. More particular considerations may be mentioned too. The federal judge is independent by constitutional guarantee; the state judge may not be. The difference surely does bear on conditions necessary for principled judging; it is, at least, a common assumption—perhaps implicit in the Constitution itself—that state courts may be more responsive to local pressures, local prejudices, local politics, than federal judges. And there is, too, the fear that state officials, including judges, will somehow be less sympathetic or generous with respect to federal claims raised by state prisoners than federal judges" (footnotes omitted).

In this regard, the sense of unfairness which may result from the Supreme Court's inability to consider every case on direct review is also a consideration. This Court can take only a "token"[8] of state criminal convictions on direct review and it chooses "important" issues; otherwise the Court could not fulfill its vast responsibilities. "Unimportant" cases, although wrong, find no remedy. *Brown v. Allen*, 344 US at 491 (opinion of Justice Frankfurter). This raises questions of fairness. *See, Bator*, 76 Harvard L Rev at 514:

> "[T]he state prisoner in an important case does have one more chance to persuade a set of judges—and judges, perhaps, of superior objectivity and fresher perspective with respect to matters of federal law—to see the case his way than a prisoner in an unimportant case. And this is a real difference". 76 Harvard L Rev at 514.

[8]Wechsler, Habeas Corpus and The Supreme Court, 59 U of Col L Rev 167, 182 (1988).

The harm caused by the failure to treat similarly situated defendants alike is a "weighty and important consideration." Bator, 76 Harvard L Rev at 514.

The additional safeguard function of habeas corpus will be substantially depreciated if the habeas court is required to defer on claims of abridgement of constitutional rules implicating fundamental fairness and accuracy to State court decisions which are "reasonable" interpretations of constitutional requirements. In *Stone v. Powell*, the Court held with respect to Fourth Amendment claims that if the State has provided an opportunity for full and fair litigation of the claim, a State prisoner may not be granted habeas corpus on the ground that evidence seized unconstitutionally was introduced at his trial. Under *Stone*, "it will be a rare case indeed in which the federal habeas court will now be able to reach the merits of a Fourth Amendment claim". Wright-Miller-Cooper, 17A Federal Practice and Procedure, §4263.1, pp 332-333 (1988).

This Court recognized in *Stone* that "reasonable" interpretations are not sufficient when fundamental principles are at stake. 428 US at 491-492, n 31. *See, Jackson v. Virginia*, 443 US at 323, distinguishing *Stone* on that basis. This Court itself has granted habeas relief in numerous cases in recent years where state courts had dismissed the constitutional claim.[9] Except for cases involving an absence of state procedures to consider the issue, there will always be a state court opinion because habeas corpus does not lie until all claims have been exhausted in the state court. 28 USC § 2254(b), (c); *Rose v. Lundy*, 455 US 509 (1982). There is no question that, for the most part, the state court decisions in such cases were reasonable, as the dissents agreeing with them in this Court in many

[9]*See, e.g., Maynard v. Cartwright*, 486 US 356 (1988); *Kimmelman v. Morrison*, 477 US 365 (1986); *Vasquez v. Hillery*, 474 US 254 (1986); *Wainwright v. Greenfield*, 474 US 284 (1986); *Miller v. Fenton*, 474 US 104 (1985); *Francis v. Franklin*, 471 US 307 (1985); *Solem v. Helm*, 463 US 277 (1983).

such cases prove. *See, e.g., Francis v. Franklin*, 471 US at 331 (Rehnquist, J., dissenting); *Solem v. Helm*, 463 US at 304 (Burger, J., dissenting); *Jackson v. Denno*, 378 US 368, 427 (1964) (Harlan, J., dissenting). The point is that implicit in all these decisions is the judgment by this Court that the constitutional right at issue was sufficiently compelling so that independent review of the claim was warranted.

The opportunity for *de novo* review of certain constitutional law decisions, such as the right to competent counsel and an inpartial tribunal, is especially important in death penalty cases. Chief Judge Godbold has noted that habeas corpus relief was granted in one half of the first 56 death penalty cases to come before the 11th Circuit. Mikva and Godbold, You Don't Have to Be a Bleeding Heart, 14 Hum Rights 22, 23 (1987). *See*, Amsterdam, In Favorem Mortis: The Supreme Court and Capital Punishment, 14 ABA Sec. Individual Rts & Resp 14 (1987) (between 1978 and 1983, of 41 appeals involving death sentences in federal courts of appeal, 73.2% were decided in favor of the prisoner). In an elaborate study for the American Bar Association, Professor Liebman demonstrated that from 1976 to 1991 federal courts had found constitituional violations in just over 40 percent of all capital habeas corpus cases. Liebman Memorandum dated July 15, 1991, annexed to Curtin Testimony before the Subcommittee of Civil and Constitutional Rights of the Comm. on Judic., H. of Rep., 102d Cong, 1st Sess. (July 17, 1991).

A decision requiring federal courts to defer to reasonable state court applications of constitutional requirements in all cases when fundamental principles are at stake would represent a return to the discredited rule of *Frank v. Mangum*, 237 US 309 (1915). In that case, the Court denied petitioner, a Jewish man convicted and sentenced to death for the rape and murder of a Christian woman, the opportunity to relitigate his claim that his trial had been dominated by an anti-semitic

mob. The Court based its decision upon its conclusion that the Georgia Supreme Court "upon a full review, decided appellant's allegations * * * to be unfounded". 237 US at 335. Justice Holmes dissented. His view, which prevailed in *Moore* eight years later, was that federal courts "must examine" such issues independently—"[o]therwise the right will be a barren one". 237 US at 347-348.

Consistent with "[e]xpanded concepts of fairness", *Jackson v. Denno*, 378 US at 390, *Frank v. Mangum* has been discredited. The principle of wholesale deference for which *Frank* stands is incompatible with the principle that habeas corpus should provide an added insurance of accuracy when fundamental principles of procedural fairness are at stake.

CONCLUSION

This Court should not utilize this case to anounce a sweeping rule, as suggested by the question presented by this Court, that departs from the longstanding rule that a federal court in a habeas corpus action must review *de novo* the state court's application of constitutional law to the facts.

Dated: Albany, New York
February 27, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York

LEE FISHER
Attorney General of Ohio

Attorneys for *Amicus Curiae*

JERRY BOONE
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

MARTIN A. HOTVET
Assistant Attorney General

Of Counsel